UNMARRIED BIOLOGICAL FATHERS

F.S. 63.032 (19) defined: not married at conception or birth to mother and who, BEFORE filing of PTPR, has not been adjudicated as "legal father" **or** has not executed affidavit per F.S. 382.013(2) c)

Note: "Legal father" not defined in Statutes but term recognized in case law as the man whom enjoys all the rights, privileges, duties and obligations of fatherhood for a specific child. See, Dept. of HRS v. Privette, 617, So.2d 305, 307 (Fla. 1993).

Inchoate Rights not Constitutional Rights

Consent is not required unless he has complied with 63.062 (2) *

63.062 (2)(a) AP > 6 mo. UBF sub. relationship, taken some responsibility, demonstrated full commitment to parenthood such as c.s./f.s. and either: 1) visited monthly or 2) regularly communicated = compliance

Caveat: UBF who lived w/child 6 mo. w/i 1 yr. of birth and immediately b/f placement who holds out to be Father = compliance

63.062(2) (b) AP <6 mo. UBF full commitment to parental responsibility by doing all of following b/f Mother signs consent:

File notarized claim of paternity with PFR

File executed affidavit re: care for child after Notice served

Pay pregnancy expenses if known

*Strict compliance not substantial compliance

- 63.062 (3) Identified and locatable fathers versus unidentified or unlocatable
  - Notice of Intended Adoption Plan served on known and locatable UBF if child is less than 6 months old
  - 63.088 Affidavit of Required Inquiry re: identity of father
- Status determined on date the Petition for TPR is filed
- Presumption of Legitimacy

  U.S. Supreme Court

  Michael H. v. Gerald D., 491 U.S. 110, 109 S.Ct. 233, 105 L.Ed.2d 91 (1989)
- Florida Courts
  - HRS v. Privette, 617 So.2d 305 (Fla. 1993)
  - DOR v. Cummings, 824 So.2d 1038 (Fla 1st DCA 2002)
  - S.M.A.L. v. Dept. Children & Family Services & Gift of Life Adoptions, 902 So.2d 328 (Fla. 2nd DCA 2005)
- Putative Father Registry Search required on ALL cases for termination of parental rights

It is the responsibility of the UBF to register and to update his information if he wishes to be provided notice. Filing in the PFR does NOT mean his consent is required, but it does mean he gets notice even if it appears his consent will not be required.

CHAPTER 39 V. CHAPTER 63

Section 39.01(49) defines what it means to be a "parent":

"Parent" means a woman who gives birth to a child and a man whose consent to the adoption of the child would be required under s. 63.062(1). If a child has been legally adopted, the term "parent" means the adoptive mother or father of the child. The term does not include an individual whose parental relationship to the child has been legally terminated, or an alleged or prospective parent, unless the parental status falls within the terms of s. 39.503(1) or s. 63.062(1). For purposes of this chapter only, when the phrase "parent or legal custodian" is used, it refers to rights or responsibilities of the parent and, only if there is no living parent with intact parental rights, to the rights or responsibilities of the legal custodian who has assumed the role of the parent.

Section 39.503(8) provides a mechanism for a prospective father to become a "party to the proceedings" and to be treated as a "parent":

[T]hat person must be given the opportunity to become a party to the proceedings by completing a sworn affidavit of parenthood and filing it with the court or the department. A prospective parent who files a sworn affidavit of parenthood while the child is a dependent child but no later than at the time of or prior to the adjudicatory hearing in any termination of parental rights proceeding for the child shall be considered a parent for all purposes under this section unless the other parent contests the determination of parenthood. If the known parent contests the recognition of the prospective parent as a parent, the prospective parent shall not be recognized as a parent until proceedings under chapter 742 have been concluded. However, the prospective parent shall continue to receive notice of hearings as a participant pending results of the chapter 742 proceedings.

Section 63.032(12) defines “parent” as:

a woman who gives birth to a child or a man whose consent to the adoption of the child would be required under Section 63.062(1). If a child has been legally adopted, the term “parent” means the adoptive mother or father of the child. The term does not include an individual whose parental relationship to the child has been legally terminated or an alleged or prospective parent.

An “unmarried biological father” under 63.032(19) is:

the child’s biological father who is not married to the child’s mother at the time of conception or birth of the child and who, before the filing of a petition to terminate parental rights, has not been adjudicated by a court of competent jurisdiction to be the legal father of the child or has not executed an affidavit pursuant to Section 382.013(2(c).

INTERVENTION 63.082(6)

- (6)(a) If a parent executes a consent for placement of a minor with an adoption entity or qualified prospective adoptive parents and the minor child is in the custody of the department, but parental rights have not yet been terminated, the adoption consent is valid, binding, and enforceable by the court.

- (b) Upon execution of the consent of the parent, the adoption entity shall be permitted to intervene in the dependency case as a party in interest and must provide the court that acquired jurisdiction over the minor, pursuant to the shelter or dependency petition filed by the department, a copy of the preliminary home study of the prospective adoptive parents and any other evidence of the suitability of the placement. The preliminary home study must be maintained with strictest confidentiality within the dependency court file and the department's file. A preliminary home study must be provided to the court in all cases in which an adoption entity has intervened pursuant to this section. Unless the court has concerns regarding the qualifications of the home study provider, or concerns that the home study may not be adequate to determine the best interests of the child, the home study provided by the adoption entity shall be deemed to be sufficient and no additional home study needs to be performed by the department.

- (c) If an adoption entity files a motion to intervene in the dependency case in accordance with this chapter, the dependency court shall promptly grant a hearing to determine whether the adoption entity has filed the required documents to be permitted to intervene and whether a change of placement of the child is appropriate.

- (d) Upon a determination by the court that the prospective adoptive parents are properly qualified to adopt the minor child and that the adoption appears to be in the best interests of the minor child, the court shall immediately order the transfer of custody of the minor child to the prospective adoptive parents, under the supervision of the adoption entity. The adoption entity shall thereafter provide monthly supervision reports to the department until finalization of the adoption. If the child has been determined to be dependent by the court, the department shall provide information to the prospective adoptive parents at the time they receive placement of the dependent child regarding approved parent training classes available within the community. The department shall file with the court an acknowledgment of the parent's receipt of the information regarding approved parent training classes available within the community.

- (e) In determining whether the best interests of the child are served by transferring the custody of the minor child to the prospective adoptive parent selected by the parent, the court shall consider the rights of the parent to determine an appropriate placement for the child, the permanency offered, the child's bonding with any potential adoptive home that the child has been residing in, and the importance of maintaining sibling relationships, if possible.

F.S. 63.089(3) GROUNDS FOR TERMINATING PARENTAL RIGHTS PENDING ADOPTION

- The court may enter a judgment terminating parental rights pending adoption if the court determines by clear and convincing evidence, supported by written findings of fact, that each person whose consent to adoption is required under s. 63.062:

Has

- (a) executed a valid consent;
- (b) executed an affidavit of non-paternity;
- (c) been served with a notice of the intended adoption plan and has failed to respond within the designated time period;
- (d) been served notice of the proceeding…, has failed to file written answer or personally appear at evidentiary hearing;

- (e) properly served notice of proceeding…has been determined to have abandoned child;
- (f) is a parent of the person to be adopted, which parent has been judicially declared incapacitated with restoration of competency found to be medically improbable;
- (g) is a person who has legal custody of the person to be adopted, other than a parent, who has failed to respond in writing to a request for consent for a period of 60 days or , after examination of his or her written reasons for withholding consent, is found withholding of consent is unreasonable;

- (h) properly served notice of proceeding..., but has been found by court, after examining written reasons for withholding of consent, to be unreasonably withholding his or her consent
- (i) is the spouse of the person to be adopted who has failed to consent, and the failure of the spouse to consent to the adoption is excused by reason of prolonged and unexpected absence, unavailability, incapacity, or circumstances that are found by the court to constitute unreasonable withholding of consent.

FINDING OF ABANDONMENT

- A finding of abandonment resulting in a termination of parental rights must be based upon clear and convincing evidence.
- May be based upon emotional abuse or a refusal to provide reasonable financial support to a birth mother during her pregnancy or on failing to establish contact with the child or accept responsibility for the child's welfare.

ABANDONED
F.S. 63.032

- "Abandoned" means a situation in which the parent or person having legal custody of a child, while being able, makes little or no provision for the child's support or makes little effort or no effort to communicate with the child, which situation is sufficient to evince an intent to reject parental responsibilities.

RELEVANT FACTORS THE COURT CONSIDERS IN MAKING A DETERMINATION OF ABANDONMENT

F.S. 63.089(4)(A)

- 1. Whether the actions of the alleged to constitute abandonment demonstrate a willful disregard for the safety or welfare of the child or the unborn child;
- 2. Whether the person alleged to have abandoned the child, while being able, failed to provide financial support;

- 3. Whether the person alleged to have abandoned the child, while being able, failed to pay for medical treatment;
- 4. Whether the amount of support provided or medical expenses paid was appropriate, taking into consideration the needs of the child and relative means and resources available to the person alleged to have abandoned the child

F.S. 63.089(4)(B)

- The child has been abandoned when the parent of a child is incarcerated on or after October 1, 2001, in a federal, state, or county correctional institution and:
- 1. The period of time for incarceration will constitute a significant portion of the child's minority. In determining whether the period of time is significant, the court shall consider the child's age and the child's needs for a permanent and stable home. The period of time begins on the date that the parent enters into incarceration;

- 2. The incarcerated parent has been determined by a court…
- to be a violent career criminal as, a habitual violent felony offender, convicted of child abuse, or a sexual predator; has been convicted of first degree or second degree murder or a sexual battery that constitutes a capital, life, or first degree felony; or ….. substantially similar offense in another jurisdiction.

- 3. The court determines by clear and convincing evidence that continuing the parental relationship with the incarcerated parent would be harmful to the child and, for this reason, termination of the parental rights of the incarcerated parent is in the best interests of the child.

INTERCOUNTRY ADOPTION

TO HAGUE TO NOT TO HAGUE

- The US is a signatory to the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoptions
- Purpose:
  - Standardize intercountry adoptions ;
  - Prevent abduction, sale and trafficking of children and;
  - Convention adoptions will be given full faith and credit by other countries.
- Entered into force April 1, 2008
- Convention Countries include: Dominican Republic; Colombia, China / Hong Kong, Colombia and India . (see complete list on www..USDOS.gov)
- Each Convention country has a "Central Authority" for monitoring request for overseas adoptions
- The Department of State (DOS) will serve as the Central Authority for the US:
  - DOS will accredit, approve and list the adoption agencies (effective July 2014;
  - The accredited agency or temporary accredited agency will be the source to provide the home study and certify other aspects under the Immigration Form I-1800 form.
- TIP: IF YOU ARE AN ATTORNEY HANDLING INTERCOUNTRY ADOPTIONS YOU WILL NEED TO GET ACCREDITED OR WORK WITH AN ACCREDITED AGENCY

WHEN DOES THE ADOPTION FALL UNDER HAGUE ?

- HAGUE COUNTRY + HAGUE COUNTRY = HAGUE ADOPTION PROCESS

- HAGUE COUNTRY + NON-HAGUE COUNTRY = NON HAGUE PROCESS

HAGUE VS. NON HAGUE

	Convention Countries	Non- Convention Counties
Your Adoption Service Provider	Licensed in U.S. state of residence + Accredited or approved by one of the Department of State's designated Accrediting Entities.	Licensed in U.S. State of residence
Adoption Services Contract	Adoption services contract contains information about agency's policies, fees, history, relationships with supervised providers, etc.	Though many ASPs disclose policies, fees and relationships with supervised providers, they are not required by most state laws to do so.
Home Study	Must meet both State and Federal requirements; Prepared by an accredited agency, supervised provider or exempted provider.	Must meet State level and USCIS federal requirements

HAGUE VS. NON HAGUE

	Convention Countries	Non- Convention Counties
Adoption Fees	Itemized in adoption services contract	
Parent Education	10 Hours of parent education	Parent education only if mandated by U.S. State of residence or voluntarily provided by agency
Adoptive Parent's Eligibility Provisional Petition Approval; Child's Eligibility	Form I-800-A; Must be filed before being matched with a child (and before Form I-800) Country of Origin must determine the child is adoptable with Convention consents and other protections, must meet definition of Convention adoptee Form 1-800	Form 1-600-A; Can Must meet orphan definition Form 1-600 be filed at the same time as the Form I-600.

HAGUE VS. NON HAGUE

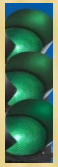
	Convention Countries	Non- Convention Counties
Child's Medical Records	Prepared, and provided by Convention country's competent authorities; Prospective adoptive parents given at least 2 weeks to review	
Visa Type / Visa Application	IH-3 or IH-4 Visas Submitted before foreign adoption/ legal custody proceedings	IR-3 or IR-4 Visas Submitted after foreign adoption/ legal custody proceedings
Adoption Records	Preserved for 75 years	

WHAT YOU MAY SEE IN YOUR FAMILY LAW PRACTICE

- If the child resides in the country of citizenship, process Hague vs . Non Hague
- Relatives or a couple that want to adopt in the US —

  - Ask where is the child from (habitual resident analysis)—

  - US or Lawful Permanent Resident of US ——————————————
  - One of the US Territories- Puerto Rico, Guam, Us Virgin Islands etc…—



- If the child came here with a VISA, EWI, or as a PAROLEE- adoption proceeds under CONVENTION STANDARDS

  - Under convention standard- the Central authority in the child's home country will determine child is not a habitual resident of it's country or Convention does not apply .

OR

  - The Central Authority may require the child return and process adoption under Convention Standards.

TIP: FOR FINAL JUDGEMENTS

- Under Scenario #1: US adoption court enters adoption order:
  - ORDER SHOULD EXPRESSLY STATE THAT THE CENTRAL AUTHORITY OF THE OTHER COUNTRY IS AWARE OF THE CHILD's PRESENCE IN THE UNITED STATES AND THAT THE CENTRAL AUTHORITY OF THAT COUNTRY HAS DETERMINEDTHAT THE CHILD IS NOT A HABITUAL RESIDENT OF THAT COUNTRY.

ICWA
INDIAN CHILD WELFARE ACT

- Mistakes under this act have dire consequences;
- Removal of the child even after an adoption is finalized.
- No adoption exists.
-
- CALL AN EXPERT!
-
- You don't want to be on the wrong side of this headline:
-
- **"SC couple fights for custody of adopted child now in OK"**
-
- In Re: Baby Veronica, 731 S.E.2d 550 (S.C. 2012). Supreme Court hearing oral argument on April 16, 2013.

CITIZENSHIP FOR THE ADOPTED CHILD

- Children adopted under the Hague and Non-Hague do acquire citizenship when:
  - One of the adoptive parents is a US Citizen;
  - The child is under 16 when adopted;
  - The child is admitted to the US as an LPR (aka-green card status/ 551 stamp on passport);
  - Live in the physical custody of the American citizen parent;
  - The adoption is final.

Hague Process	No Hague Process
Child enters US after adoption- IH-3 / automatic citizenship	Child enters US already adopted – IR-3/ automatic citizenship
Child enters US before adoption IH-4/ citizenship after adoption in US.	Child enters US before adoption-IR-4/ citizenship after adoption in US.

FINAL TIPS

- Work with an immigration attorney (AILA)
- All immigration forms - www.USCIS.gov
- Intercountry Adoption - www.state.gov

385326(#2)#&: $

- Legislative Intent – 25 USCA 1901(4) – that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.

- Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).
- ICWA applies even if Indian parents want to place child with non-Indian family.

25 USCA 1902 – CONGRESSIONAL DECLARATION OF POLICY:

- The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

INQUIRE AT THE BEGINNING TO DETERMINE THE APPLICABILITY OF ICWA.

- In Re: T.D. – 890 So.2 473 (Fla. 2d DCA 2004)

- DO NOT MAKE YOUR OWN DETERMINATION. "Birth mother does not look Native American."

DEFINITION

- 25 USCA 1903(3) and (4)
- Defines “Indian” as “a member of an Indian Tribe,” and “Indian Child” to mean any unmarried person who is under age 18 and is either (a) a member of an Indian tribe, or
- (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.
- VERY PROBLEMATIC
- Hundreds of tribes with their own rules about who is a member and who is eligible for membership.

25 U.S.C.A. 1912:

- If the child is a Native American child, notice to, and possibly the consent of the tribe, may be required.

- In any involuntary proceeding in a State court, where the court knows, or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention.

PRACTITIONERS BEWARE

- Is giving notice to the tribe a violation of the birth parents' constitutional right to privacy?
- Cooperative birth fathers should not sign Consents or Affidavits of non-paternity that have language acknowledging paternity.
- Consents under ICWA may not be given until more than 10 days after the birth of the child. It must be in writing, AND be done before the court. A carefully crafted colloquy should be given concerning ICWA.

- G.L. v. DCF, 80 So.2d 1065 (5th DCA 2012). Issue of the applicability of ICWA may be raised on appeal.
- LESSON:
- CALL AN EXPERT WHEN:
- You learn that the child involved may have Native American heritage.

CASE LAW UPDATE 2011-2012
SIGNIFICANT RECENT ADOPTION CASES

by Patricia L. Strowbridge, Esquire

I. RECENT CASE LAW

MARTIN & MARTIN v IN RE: THE ADOPTION OF LMD
3D10-2407 (3rd DCA, July 5, 2011)

Maternal Grandparents adopted the child with the consent of the birth mother. Two years after the adoption was finalized, the birth mother moved to vacate the adoption decree based upon allegations of fraud.

The adoptive parents moved to dismiss the challenge because it was barred by the statute of repose. The birth mother argued that the statute of repose does not apply in cases of fraud. The trial court denied the Motion to Dismiss. The Third District reversed and concluded that the statute of repose is one year for all reasons, including fraud.

Although trial courts are often troubled by statutes of repose, the appellate court seemed to clearly recognize the need to balance the rights of all parties in adoption.

DEPARTMENT OF REVENUE v. LYNCH
1D10-2391 (5th DCA, February 7, 2011)

In an action for enforcement of child support against a father (who was adjudicated despite an objection that there was little proof of paternity), the father filed a Motion for Scientific Paternity Testing which the trial court granted. DOR appealed and argued that the order departed from the essential requirements and would cause irreparable harm. Fifth District agreed and found that although the father placed paternity at issue, he did not show "good cause" for the testing which could "result in harm that cannot be remediated on plenary appeal".

Although not an adoption case, practitioners are often faced with requests for paternity testing by unmarried biological fathers and this case highlights the potential harm such testing can cause.

NABINGER v. NABINGER
82 So. 3d 1075 (1st DCA, Dec. 30, 2011)

Husband and Wife adopted a child who was eligible for an adoption subsidy. When the

parties divorced, the settlement agreement specified that the Wife would receive the subsidy. Child support was calculated without reference to the subsidy. When the Wife sought an upward modification of the support three years later, the trial court approved the modification, but granted a credit to the Husband against his support obligation, for the amount of the child's subsidy. The District Court reversed and opined that not only was this not contemplated in the parties' original settlement agreement, but the trial court's approach was inconsistent with public policy.

G.L., FATHER OF T.M.L. v. DCF
80 So.3d 1065 (5th DCA, February 14, 2012)

When DCF filed an expedited petition to terminate the parental rights of T.M.L.'s mother and father, a notice was filed with the court, by T.M.L.'s mother alleging that both she and the child had Indian ancestry and that the ICWA was applicable.

Without making any determination of the applicability of the ICWA, the trial court entered a judgment against both parents. The father appealed and raised the issue of the ICWA. DCF objected that the father did not raise the issue of the ICWA in the trial court proceedings.

Florida Fifth District reversed the termination judgment find that under the ICWA, it was the trial court's responsibility to notify the tribe, if the Court knew or had reason to know the child was affiliated with a Native American tribe. The issue of the applicability of the ICWA can be raised for the first time on appeal, because it is the purpose of the ICWA to protect both the Indian children and Indian tribes and families.

J.T.J. v. N.H.
4D11-19 (4th DCA, April 4, 2012)

N.H. and E.R. were married at the time of G.H.'s birth, but E.R. was not listed on G.H.'s birth certificate. G.H.'s biological father is J.T.J.

G.H. tested positive for drugs at birth and was placed in DCF custody. Both N.H. and E.R. signed surrenders to DCF.

Over a year after G.H. was born, J.T.J. filed a paternity action seeking to be established as G.H.'s father and to be allowed to receive custody of G.H. E.R. admitted to J.T.J.'s paternity in his Answer to the petition, and denied that he was G.H.'s father. N.H. objected to the Petition and requested that it be dismissed based upon J.T.J.'s lack of standing.

The trial court dismissed J.T.J.'s case with prejudice because the child was born into an intact

marriage.

The Fourth District reversed stating that the trial court must hold an evidentiary hearing to determine if the biological father has standing, and must "evaluate all the circumstances and DCF's position regarding the biological father in determining the father's standing and the child's best interests".

The court notes that while the presumption of the legitimacy is "one of the strongest rebuttable presumptions known to law", it can be "overcome with clear and compelling reason based primarily on the child's best interests".

IN THE INTEREST OF Z.C. (1) and Z.C. (2), children.
DCF and GAL Program v. K.D. and Z.H.
2 D10-3474 (2nd DCA, May 9, 2012)

Z.C.(1) and Z.C.(2) are twins. At 17 days of age, Z.C.(1) was severely injured while in the care of the parents. The parents' stories about what had happened to Z.C.(1) lacked credibility, and the court believed the parents were lying to cover up the truth behind the injuries.

Based upon the severity of the injuries, DCF filed an expedited Petition for Termination of Parental Rights and sought termination as to Z.C.(1) based upon the injuries he sustained, and as to Z.C.(2) based upon the "totality of the circumstances" and the "nexus" which created an unreasonable risk of harm to Z.C.(2) if parental rights were not terminated as to him also.

The Court concluded that DCF had proven its case as to both children by clear and convincing evidence, but declined to enter the judgment. The Court, instead, found dependency with permanent guardianship with the maternal grandparents to be the "least restrictive means" for protecting the children. The case does not indicate why the maternal grandparents were not candidates to adopt, but apparently they were not.

Second District reversed the trial court finding that since DCF had adequately plead and proven its case, it was entitled to entry of the judgment both as to Z.C.(1) and as to Z.C.(2). The least restrictive means test does not permit the court to deny the termination because a permanent guardianship is a placement option.

Furthermore, DCF had filed a case plan which contained a permanency goal of adoption and the court did not have the authority to modify the case plan without proper notice to all parties and affording a right to be heard.

MICHAEL J. ASTRUE, COMMISSIONER OF SOCIAL SECURITY v. KAREN CAPATO

566 U. S. _____ (2012) (May 21, 2012)
132 S.Ct 2021

Karen and Robert Capato were married for less than three years when Robert passed away from esophageal cancer. During the marriage, Karen gave birth to a son. The couple agreed they wanted additional children and Robert had his sperm cryopreserved to protect it from the chemotherapy they hoped would cure him.

After Robert's death, Karen used in vitro fertilization and became pregnant with twins using Robert's sperm. The twins were born 18 months after Robert's death.

Karen applied for Social Security survivor's benefits for the twins after moving from Florida to New Jersey, which Social Security denied. The Third Circuit Court of Appeals reversed the determination by Social Security, and an appeal was taken to the U.S. Supreme Court.

Although the Social Security Act was passed long before assisted reproductive technology made a posthumously conceived child a possibility, §416 (h) provides the definition of a "child" for purposes of qualifying for benefits. This section specifies that, "In determining whether an applicant is the child or parent of an insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply [the intestacy law of the insured individual's domiciliary State]. Florida was Robert's domiciliary State at the time of his death, and Florida Statutes §732.106 provides a definition of "afterborn heirs", as "heirs of the decedent conceived before his or her death, but born thereafter".

Based upon the language in Florida's intestacy laws, and the lack of any provision to the contrary in Robert's will, the afterborn Capato twins would not be eligible for survivor benefits.

F.R. v. ADOPTION OF BABY BOY BORN NOVEMBER 2, 2010

1D12-16 (1st DCA, May 21, 2012)

Birth mother was born and raised in central Africa. At a refugee camp in Tanzania, birth mother was raped and became pregnant, prior to being relocated to Jacksonville, FL by a refugee resettlement organization, World Relief. Six months after arriving in the U.S., the birth mother gave birth to Baby Boy. Birth mother did not speak or read English, and was fluent only in Swahili. Her sister acted as an interpreter for her, but she spoke only limited English. The consent documents for the adoption were in English and no translated documents were available to the birth mother. The trial court denied the birth mother's Motions to Vacate and Set Aside the Consents without a full evidentiary hearing, finding that her allegations would not support findings of fraud or duress.

The First DCA reversed and remanded for an evidentiary hearing, specifically holding that anything less would violate the "basic tenets of due process" and questioned how "the lack of a proper translation of documents into a language the mother could comprehend" would not give rise to concerns about "the fundamental fairness of the entire proceedings".

T. H. v. DCF

3D12-1146 (3RD DCA, August 22, 2012)

Third District affirms the termination of T.H.'s parental rights without prejudice to file a motion or petition seeking collateral relief on his claim that his appointed counsel provided constitutionally ineffective assistance. The appellate court was careful to avoid deciding whether or not T.H. had a right to seek such relief, or if there was any indication that he had received ineffective assistance of counsel.

WILLIAM MALCOLM FABRE v. STEPHANIE FABRE and KEVIN MICHAEL O'KEEFE

37 Fla L. Weekly D2042 (a) (5th DCA, August 24, 2012)

Child conceived while birth mother was married to O'Keefe. Birth mother divorced O'Keefe and married Fabre, the biological father of the child.

The divorce judgment between O'Keefe and the birth mother established O'Keefe as the father. Fabre filed to establish paternity and the birth mother agreed but O'Keefe objected.

Trial court dismissed Fabre's petition and he appealed.

Fifth District reversed and remanded to allow Fabre to amend his Petition to assert legal standing.

II. SNEAK PEEK (STUFF COMING UP!!)

C.S. v. HEART OF ADOPTIONS, INC.

2nd DCA Case No.: 2D11-6030

Birth mother worked with agency for several months, insisting throughout that she did not know the identity of the birth father because she was prostituting.

Two weeks after the placement, the birth father contacts the agency and demands custody of

the baby.

The trial court ruled that the birth father's consent was not required and birth father appealed.

Issue before the Second DCA is: whether or not the statutory provision that cuts off the inchoate rights of an unmarried biological father who is not identified by the birth mother, upon the filing of a Petition for Termination of Parental Rights, is constitutional?

S.C. v. GIFT OF LIFE, INC.

2nd DCA Case No.: 2D12-1757

Unmarried biological father served with a Notice of Intended Adoption Plan and fails to timely register with the Florida Putative Father Registry. Birth father is indigent and requests a court appointed attorney. Following controlling case law in the Second DCA, the trial court appoints Regional Counsel, but thereafter rules that the birth father's failure to timely register means the termination of parental rights should be granted.

The issue on appeal is the claim of Regional Counsel that the birth father's right to counsel requires that counsel be appointed prior to the expiration of the 30 days on the Notice of Intended Adoption Plan.

ADOPTIVE COUNSEL v. BABY GIRL, a minor under the age of 14 yrs, BIRTH FATHER and THE CHEROKEE NATION.

Opinion No.: 27148, South Carolina Supreme Court, Filed 7-26-12

(Case headed to the U.S. Supreme Court)

Private adoption of Baby Girl born in Oklahoma in September 2009 wherein the mother executed consents the day after the baby's birth and a TPR was filed two days thereafter. Four months later the unmarried biological father, who was a registered member of the Cherokee Nation, was served with legal papers entitled "Acceptance of Service and Answer of Defendant" which indicated that he would not contest the private adoption and waived the thirty day waiting period and notice of the hearing.

Despite having signed these documents, the biological father, an active duty military person, filed for a stay of the proceedings under the Servicemember's Civil Relief Act ("SCRA") and a few days later filed a Summons and Complaint in Oklahoma to establish paternity of Baby Girl. Biological father also sought to assert the authority of the Federal Indian Child Welfare Act (ICWA) and the Oklahoma Indian Child Welfare Act (OICWA). Several months later,

the Cherokee Nation filed a Notice of Intervention in the South Carolina adoption proceedings. As a result of the biological father's paternity action, Baby Girl was deemed to be an "Indian Child" under both the ICWA and the OICWA.

It appears there was substantial evidence of prebirth and postbirth abandonment of the birth mother and Baby Girl by the biological father and there was substantial testimony and evidence presented to suggest that removing Baby Girl from the adoptive couple would result in traumatic harm to Baby Girl. Ultimately, however, the South Carolina Supreme Court ruled that although the adoptive couple "are ideal parents who have exhibited the ability to provide a loving family environment for Baby Girl" the ICWA required that custody of Baby Girl be given to the biological father unless the court could determine "beyond a reasonable doubt that custody by him would result in serious emotional or physical harm to Baby Girl." The dissenting opinions by two of the South Carolina Supreme Court Justices focus on the failure to take into consideration the best interests of Baby Girl, and disagree that the ICWA should elevate the biological father's rights to a level above that of Baby Girl, even in the face of substantial evidence of prebirth and postbirth abandonment.

The case was recently reported to be headed to the U.S. Supreme Court on the issue of the relationship between the ICWA in private adoption cases and the best interests of the child.

III. CASES WORTH KEEPING IN YOUR FILE DRAWER

L.J. v. A.S.
25 So.3d 1284 (2nd DCA, February 3, 2010)

AS was married approximately a year before the child was born. Less than six weeks after the marriage, AS and her husband separated and the husband instituted divorce proceedings. Approximately a month after the divorce proceedings were initiated, AS conceived the child with the biological father LJ, who was born nearly six months after the divorce was finalized.

LJ attempted to establish paternity but his Petition was dismissed with prejudice because he lacked standing. Second District reversed and remanded to allow him to attempt to establish standing because the facts reflect a possibility that he could terminate the legal father's rights based upon abandonment without objection from the legal father.

Case does not overturn the presumption of legitimacy, but rather grants the putative father an opportunity to seek to establish standing.

J.C.J. v. HEART OF ADOPTIONS, INC.,
989 So.2d 32 (2nd DCA 2008)

This case was one of three cases disapproved by the ruling in Heart of Adoptions v J.A., the Second District reversed the termination of the parental rights of the unmarried biological

father and remanded for a determination as to whether or not the biological father's consent would be required pursuant to F.S. §63.062(2)(b) and F.S. §63.089.

After a lengthy termination hearing, the trial court concluded that JCJ's failure to provide financial support to the birth mother after becoming aware of the pregnancy rendered his consent unnecessary. The case is significant on the remand for two reasons… first, the appellate court rejected an assertion by the agency that the biological father's support obligation arose from the time of conception, finding instead that it arose when he became aware of the pregnancy (near the end of the pregnancy in this case), and secondly, that the biological father's support obligation continued after the placement and up to the termination hearing (almost four years). This last holding in the case is now codified into F.S. §63.

G.S. v. T.B

985 So.2d 978 (Fla. 2008)

Although it is the trial court's responsibility to insure that the best interests of the child are served by its decision, the trial court's determination is not without limits, and it must follow the Legislature's guidance.

The Legislature favors adoption of legally free minor children as the preferred method for providing stability and permanency.

IN RE: THE ADOPTION OF DONALD FORREST HOLLAND

965 So.2d 1213 (5th DCA 2007)

The trial court abused its discretion in denying an otherwise sufficient and properly pled petition to adopt an adult grandchild because the motivation for the adoption was to obtain educational benefits available to children, but not grandchildren, of disabled veterans. The public policy of Florida permits the adoption of adults and it does not violate public policy if, as a result of the adoption, the adoptee becomes entitled to a benefit authorized by law.

HEART OF ADOPTIONS, INC. v. J.A.

963 So.2d 189 (Fla. 2007)

An unmarried biological father's failure to timely file with the Florida Putative Father Registry could provide a valid basis for termination of his parental rights.

An adoption entity has an obligation to timely serve a Notice of Intended Adoption Plan with specific information about the filing requirements with the Florida Putative Father Registry on any unmarried biological father who is known and locatable through diligent search.

T.B. v. M.M.

945 So.2d 637 (2nd DCA 2006)

Birth mother, M.M., had sexual relations with T.B. and another man. Neither putative father was named on the birth certificate, although both men were present at the delivery. M.M.

and the child lived with the other man from the time of discharge from the hospital. Shortly before the child's second birthday, T.B. filed a paternity action and served it upon M.M. Two days after being served, M.M. and the other man obtained a marriage license and were married a week later. The day after the marriage ceremony, the other man's name was added to the child's birth certificate and MM thereafter sought dismissal of T.B.'s claim based upon the existence of a legal father. Trial court dismissed the case and T.B. appealed.

The DCA reversed because the establishment of the other man as the legal father was a defensive move designed to avoid T.B.'s paternity action, and as such presumption of legitimacy will not bar the claim, but will merely establish a rebuttable presumption of paternity.

V.J. v. DEPARTMENT OF CHILDREN AND FAMILIES

949 So.2d 1128 (3rd DCA 2007)

Biological father's parental rights terminated based upon abandonment when biological father had been incarcerated from the time the child was three months old until shortly before the case was filed when the child was 5-1/2 years old. Court noted that biological father had demonstrated no interest in the child during the vast majority of her young life, had not had contact with her or provided for her during his incarceration and only began receiving necessary services to become a parent after being released from prison.

E.T. v. STATE OF FLORIDA AND DEPARTMENT OF CHILDREN AND FAMILIES

930 So.2d 721 (4th DCA 2006)

Right to court-appointed counsel in TPR cases implies the right to effective assistance of counsel, i.e. if you are entitled to a lawyer, you're entitled to a competent one.

M.E.K. v. R.L.K.

921 So.2d 787 (5th DCA 2006)

Indigent incarcerated mother petitioned for court-appointed counsel in a Chapter 63 private adoption proceeding following the prior decisions in the 1st and 2nd District Courts of Appeal, the 5th District Court of Appeal reversed trial court's denial of the request of court-appointed counsel based upon the U.S. Supreme Court case of Lassiter. It is now generally accepted that indigent birth parents are entitled to court appointed counsel.

C.G. v. GUARDIAN AD LITEM PROGRAM

920 So.2d 854 (4th DCA 2006)

DCF took custody of infant immediately after birth. Birth mother executed consents to a private adoption attorney, with intent to place minor child with identified prospective adoptive parents who were providing foster care for the child. Subsequent to the execution of consents, private adoption attorney announced that the prospective adoptive parents did not intend to go forward with accepting placement of the child, therefore, the private

adoption attorney declined to intervene in the dependency action and accept custody of the child. Birth mother requested to set aside her adoption consents, and the trial court declined to permit her to do so, finding that the consents were binding and irrevocable. 4th DCA affirms.

W.R. v. DEPARTMENT OF CHILDREN AND FAMILY SERVICES,
896 So.2d 911 (4th DCA 2005)

Previous termination of parental rights as to other children does not alter or lessen the burden of proof necessary to support a termination of parental rights as to child subject to the action.

In the Interests of S.N.W., ADOPTION MIRACLES, et al v. S.C.W., et al
912 So.2d 368 (2nd DCA 2005)

Trial court in dependency proceeding is "required" to permit an adoption entity to intervene in dependency case where birth parent(s) required to consent to adoption of a minor at issue in the dependency case has executed such a consent.

E.A. Father of B.S. and B.S., Children v. DEPARTMENT OF CHILREN AND FAMILIES,
894 So.2d 1049 (5th DCA 2005)

A natural parent has a fundamental liberty interest in his or her offspring that is protected under the due process umbrella. Although a court has the authority to terminate the parental rights of a parent who fails to appear at an adjudicatory hearing, due process considerations require the court to take appropriate steps to avoid a termination of "parental rights on a 'gotcha' basis".

NOTE: Father was 22 minutes late for hearing after being caught in a traffic jam on I-4 between Polk County and Osceola County. Father called and left message with the court answering machine. Father arrived in the middle of the hearing and was advised that he had been defaulted and would not be permitted to participate.

IN RE: S.M.A.L., S.K.R. v. DCF and GIFT OF LIFE ADOPTIONS, INC.
902 So.2d 328 (2nd DCA 2005)

Birth mother (who was married, but not to the biological father) and biological father executed voluntary consents for child to be released from custody of the state and placed with a private adoption entity. Legal father objected and trial court granted termination of parental rights determining that legal father "had no standing to object". Appellate court reversed and reaffirmed the presumption of legitimacy.

B.Y. v. DEPARTMENT OF CHILDREN AND FAMILIES,
887 So.2d 1253 (Fla. 2004)

Florida Supreme Court ruled that the consent of the Department of Children and Families to an adoption of children in DCF's legal custody by virtue of a termination of parental rights is not a statutory prerequisite that would supercede the trial court's authority to enter such orders as are in the best interest of the children. NOTE: this was the "placement" selected by DCF, and although the court could finalize the adoption despite DCF's objection, other case law makes it clear that after a termination of parental rights and commitment of the child to DCF, the court does not have the authority to select a different placement for the child.

C.B., the Mother v. DEPARTMENT OF CHILDREN AND FAMILIES
874 So.2d 1246 (4th DCA 2004)

A parent's incarceration can be a factor for the court to consider in a proceeding to terminate parental rights based upon abandonment, but incarceration alone is insufficient. There must also be evidence that any continued involvement between mother and child would threaten the life, safety, well-being or physical, mental or emotional health of the child.

ACHUMBA v. NEUSTEIN
793 So.2d 1013 (5th DCA 2001)

Florida does not recognize dual "fathership". A child's legally recognized father has an unmistakable interest in maintaining the relationship with his child unimpugned. Even in cases with absolute proof of the identity of the child's father, this, without more, will not constitute grounds to grant a paternity petition. Clearly, biology is not the only factor used to determine paternity. Paternity and legitimacy are separate and distinct concepts. Any child born during a lawful marriage is considered "legitimate" irrespective of his or her biological connection, or lack thereof to the mother's husband. See, also Daniel v. Daniel
695 So.2d 1253 (Fla. 1993)

TROXEL v. GRANVILLE
530 U.S. 57, 120 S.Ct. 2054 (2000)

Due Process clause of the Fourteenth Amendment of the U.S. Constitution protects the fundamental rights of parents to make decisions as to the care, custody and control of their children. Although this case essentially dealt with the constitutionality of a grandparent visitation statute, it has broad applicability whenever a birth parent's decision regarding their child is challenged by a third party.

G.T. v. A.E.T.
725 So.2d 404 (4th DCA 1999)

When a natural mother decides to place her baby for adoption because of "generalized social and financial pressures" her placement decision is deemed to be voluntary provided that no

one exerted coercion, duress or fraud to manipulate or force her to do so. In an additional holding, that the birth father had abandoned the child the court notes that "the inquiry focuses not so much on finding a fault as it does on whether there has been a demonstration, through actions, of a commitment to the child." In this case the court determined that the father's mistaken belief that he was not the child's father is not a valid defense to the claim of abandonment.

K.C. v. ADOPTION SERVICES, INC.

721 So.2d 811 (4th DCA 1998)

Biological parents who have executed consents to adoption or termination of parental rights that otherwise comply with statutory requirements, and wish to invalidate the consents, carry the burden of proving fraud or duress by clear and convincing evidence.

W.T.J., ADOPTIVE FATHER of K.A.R. v. E.W.R., NATURAL FATHER of K.A.R.

721 So.2d 723 (Fla. 1998)

Notwithstanding the prior rulings of the Florida Supreme Court specifying that incarceration of a biological parent, standing alone, will not constitute presumptive abandonment of the child, incarceration as a result of crimes committed by a biological parent after being made aware of the pregnancy which naturally and appropriately result in a sentence for a lengthy incarceration will be deemed to be "relevant and sufficiently egregious that they may be considered conduct which supports a finding of abandonment under Chapter 63 Florida Statutes".

IN THE MATTER OF THE ADOPTION OF A.M.M. and A.N.M.

25 Kan. App. 2d 605; 949 P.2d 1155 (Kansas Court of Appeals, 1997)

Failure of the mother and the prospective adoptive parents to comply with ICPC was sufficient ground to set aside mother's consent. Mother's residence was determined on the date she signed consents, and not on the date the petition was filed.

C.S. and J.S. v. S.H. and K.

671 So.2d 260 (4th DCA 1996)

Once parental rights have been terminated by DCF in a Chapter 39 proceeding, the selection of an appropriate adoptive home falls within the authority of DCF, and the trial court may not intervene and select between two competing adoptive homes when DCF has clearly indicated the placement they believe is appropriate.

KRANZ v. KRANZ

661 So.2d 876 (3rd DCA 1995)

Natural parent's obligation for payment of child support arrearages accrued prior to the Final Judgment of Adoption are vested and not subject to retroactive modification as the result of

the entry of the final decree of adoption terminating that parent's rights.

PEREGOOD v. COSMIDES

663 So.2d 665 (5th DCA 1995)

Parents may not use the adoption statute to terminate one parent's rights in order to avoid obligations for child support, as such an arrangement is void as against public policy. In this case, Serena and James, parents of Michael, agreed to both execute consents for adoption with Serena then petitioning to re-adopt Michael. As a result, James was relieved of any further obligations for support of Michael, and Serena was relieved of any obligation to arrange visitation for James with Michael. The court found that Michael, the child, had standing to seek to set aside the adoption on the grounds that it was a "sham" and that, under Florida law, Serena and James did not have the right to contract away his support.

IN RE: THE ADOPTION OF BABY E.A.W., G.W.B. v. J.S.W.

658 So.2d 961 (Fla. 1995)

Trial court may properly consider lack of emotional support and/or emotional abuse by the father toward the mother during her pregnancy, for purposes of evaluating "the conduct of the father toward the child's mother during the pregnancy" under Florida Statute § 63.032 (14).

RUSHING v. BOSSE

658 So.2d 869 (4th DCA 1995)

Grandparents individually, and on behalf of a minor child brought action against attorneys for prospective adoptive parents for professional negligence, malicious prosecution, civil conspiracy and intentional infliction of emotional distress.

Birthmother of child, who had legal custody, took 2 yr old child to attorneys to place her for adoption. Grandmother and Great Grandmother had essentially raised the child from birth, but attorneys failed to give notice to the grandparents. Adoption was subsequently overturned and the civil suit followed.

Appellate court held that the child could bring an action for negligence and malicious prosecution; grandparents have no cause of action on any ground; nor can the child prevail on civil conspiracy or intentional infliction of emotional distress since the high legal standard cannot be met because the attorneys representing their client have "absolute immunity".

DOE v. ROE

543 So.2d 741 (Fla. 1989)

This case is most frequently cited for the position of the Florida Supreme Court that pre-birth conduct of the father is relevant to the issue of "abandonment" under Chapter 63 for purposes of determining whether or not the father's consent to the adoption is required.

Furthermore, the Court opined that "only marginal efforts that do not evince a settled purpose to assume all parental duties" may also properly result in a determination that the father has abandoned the child.

Other less significant holdings in this case include a finding that the "best interests of the child" is not a relevant factor unless the child was "legally available" to be adopted and "bonding" of a newborn infant with the adoptive family is not a proper consideration in determining whether the child should be returned to the natural parents, unless the child has been with the adoptive parents for an extended period of time. Presumptively, this last holding means "at the time the contest is initiated" since other cases clarify that the child's bonding with adoptive parents during protracted litigation will not be a legally appropriate consideration.

IN RE: THE ADOPTION OF BABY GIRL "C", E.H. and B.H. v. K.S.

511 So.2d 345 (2nd DCA 1987)

If birth parents contest adoption proceedings arguing revocability of executed consents due to duress, it is not a proper defense to argue unfitness of the birth parents in the Chapter 63 adoption. Issues of unfitness can only properly be raised in a Chapter 39 termination of parental rights.

HAMILTON v. BEARD

490 So.2d 1297 (2nd D.C.A. 1986)

Adoption proceeding are wholly statutory in nature since the right of adoption was unknown at common law

INTEREST OF PAWLING v. GOODWIN

679 P.2d 916 (Supreme Court of Washington 1984)

"Parental obligations entail these minimum attributes: (1) express love and affection for the child; (2) express personal concern over the health, education and general wellbeing of the child; (3) the duty to supply the necessary food, clothing, and medical care; (4) the duty to provide an adequate domicile; and (5) the duty to furnish social and religious guidance. Citing In Re Adoption of Lybbert, 75 Wash. 2d 671, 453 P.2d 650 (1969)

A father who fails in his parental obligations due to "his numerous incarcerations in jail or prison" for misdemeanor or felony convictions may have his parental rights terminated because "it was his choice as to whether (1) he would fulfill his parental obligations, or (2) commit criminal acts." Citing In Re Adoption of Dobbs, 12 Wash. App. 676, 531 P.2d 303.

RAMEY v. THOMAS

382 So.2d 78 (5th DCA 1980)

Any proceeding regarding custody of a child, including adoption, must be governed by the best interests of the child.

HEIDBREDER v. CARTON

645 N.W. 2d 355 (Minn 2002)

The Birth mother, Carton, concealed her whereabouts for 31 days, from the unmarried biological father, who was required by Minnesota law to register in the state putative registry within 30 days of the birth of the child. Upon being advised that the birthmother had delivered the baby in Minnesota, the birth father immediately registered, but was barred from contesting the adoption. In this difficult case, the Minnesota Supreme Court stressed the importance of having a firm time period, and opined that regardless of where the legislature chose to put the line, there would always be the possibility that someone could miss the filing date by one day. The Court also held that there was no authority in any jurisdiction they could locate that would require a pregnant woman to advise an unmarried biological father of her whereabouts or to maintain communication with him.